Office Supreme Court U. S.
FILED
APR 24 1899
JAMES H. McKENNEY,

No. 2744. 35

Brief of Guthrie & Mayes for (Mississippi Railroad Tax Case)

Filed April 24, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 2744

ON MOTION TO DISMISS OR AFFIRM.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent, Etc.

In error to the Supreme Court of Mississippi.

BRIEF OF ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
JAMES FENTRESS,
NOEL GALE,
Of counsel for plaintiffs in error.

WASHINGTON, April 24, 1899.

To replace file copy accidentally destroyed

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 756.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent, Etc.

In error to the Supreme Court of Mississippi.

BRIEF OF ARGUMENT FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

This application for the dismissal of the writ of error or affirmance without opportunity for a full hearing upon the question of jurisdiction and the merits should be denied. The present case not only involves a very large amount of money[1], but the points presented are of far-reaching consequence to the plaintiffs in error and other railroads in the State of Mississippi. The nature of the contract now impaired and nullified has never been considered by this court. A summary dismissal of the writ of error upon motion without argument would work great injustice to the plaintiffs in error by denying them their right to have their day in court. It is true that cases involving state taxes should be closely scrutinized and that any unnecessary delay in disposing of them should be prevented in order that a State may not be embarrassed in their collection. But this rule does not warrant a withholding of the right to be heard in argument upon the merits of such grave and serious issues as are here involved.

1. The judgment below is for $548,676 taxes and $27,433 penalty, and suits for the taxes of other years are pending.

In this case, moreover, it is quite proper to call the attention of the court to the fact that the State will not suffer any particular hardship or inconvenience by reason of the delay necessary for an argument. Taxes on the railroad in question have never been collected by the State, and therefore a short delay now cannot embarrass it. Indeed, it is only by a complete change of front on the part of the state courts—by the overturning of a long line of decisions and the reversal of the previous policy of the State[1]—that there is now any chance of these taxes being exacted in violation of what were relied on as contract and vested rights. At best, the present asserted right of the State to collect the taxes is purely accidental and the unintentional result of a voluntary consolidation of railroad companies. The argument on the merits can be advanced for hearing and an ample supersedeas bond has been furnished to protect the State.

The Federal question now presented has been litigated for years in the state court. The Supreme Court of Mississippi on the first hearing of this case ordered two rearguments and took eighteen months to reach a conclusion, and even then the decision was by a divided court, two judges to one. The result was the reversal of a decision which was exactly in point and which involved the same charter, the action being merely for a different year's taxes.[2] The particular decision now sought to be reviewed practically overrules and disregards rulings in similar cases acquiesced in for over twenty years. The Chief Justice of Mississippi dissented, lamenting the over-

1. *Mississippi Mills* v. *Cook*, 56 Miss. 40, 50; *McCulloch et al.* v. *Stone*, 64 Miss. 378; *Y. & M. V. R. R. Co.* v. *Thomas et al.*, 65 Miss. 553; *Vicksburg Bank* v. *Worrell*, 67 Miss. 47; *Attala County* v. *Kelly*, 68 Miss. 40; *L. N. O. & T. Ry. Co.* v. *Taylor*, *68 Miss.* 361; *Railroad Co.* v. *Lambert*, 70 Miss. 779.

2. *Railroad Co.* v. *Lambert*, 70 Miss. 779, 788.

ruling of the prior cases[1]. The present judgment, which was rendered upon the second appeal, is also upon a decision by a divided court; for the Chief Justice adheres to his former dissent. He also certifies to this court in the clearest language that a Federal question was involved below.[2]

The propositions upon which the plaintiffs in error have always relied and now rely as involving Federal questions are (1) that the provision as to the application of taxes embodied in the charter of the Louisville, New Orleans and Texas Railway Company constituted a valid

1. In dissenting Chief Justice WOODS said: "The Lambert and the Cook decisions are themselves supported by reason and authority, and should not be overruled. It is lamentable if no opinions, however supported in reason or by authority, and no matter what rights may have arisen under them, are to be permitted to stand simply because not in agreement with the personal views of succeeding judges. No greater reproach can be fixed upon the judiciary, no greater calamity can befall the State than to have it understood that, with every change in the mere membership of the court of final resort, the law as solemnly declared by former courts, composed of different membership, is to be unsettled, and again and again unsettled by every succeeding court, simply to enable new judges to exploit their peculiar views. In such case, all notion of stability and fixedness is gone, and absolute uncertainty and endless confusion will be introduced into our jurisprudence." (Special Record, p. 130).

2 STATE OF MISSISSIPPI,
IN THE SUPREME COURT, NOVEMBER SPECIAL TERM, 1898.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Appellants,
v.
WIRT ADAMS, State Revenue Agent.

I, Thomas H. Woods, chief justice of the supreme court of the State of Mississippi at the present time and upon the argument and hearing of the above-entitled appeal, do hereby certify:

I. That upon the said argument and hearing the validity of legislation and of sections 180 and 181 of the constitution of Mississippi subsequent to the statute of Mississippi of March 3rd, 1882, was drawn in question by the said Yazoo and Mississippi Valley Railroad Company, the said Illinois Central Railroad Company, the said Chicago, St. Louis and New Orleans Railroad Company, the said Canton, Aberdeen and Nashville Railroad Company, the said Stuyvesant Fish, and the said James T. Harrahan, on the ground of such legislation being repugnant to section 10 of article 1 of the Constitution of the

contract; (2) that this contract has not been waived but is still in full force and effect, and (3) that the giving effect to the subsequent tax laws impaired its obligation. The validity and effect of the contract were the only real issues ever involved in the controversy.

It is, of course, well established that the plaintiffs in error are entitled to have the original existence, the nature and the proper construction of the contract determined independently by this tribunal as well as the question whether the contract is still in existence and has been impaired. Upon those essentially Federal questions a hearing is now prayed. It must certainly seem unreasonable to say that an appeal to this court in this case involves no Federal question whatever, or that, even if a Federal question is involved, it is manifestly "so frivolous as not to need further argument."

United States, in that such legislation and constitutional provisions impaired the obligation of a contract between the State of Mississippi and the Yazoo and Mississippi Valley Railroad Company, and that the decision of the said supreme court of Mississippi was in favor of the validity of such legislation and such constitutional provisions.

* * * * * * *

III. That upon the said argument and hearing the validity of the statutes of Mississippi in the annotated code of 1892 providing for the taxation of railroads and of the act of 1894 defining the powers of the State Revenue agent and of sections 180 and 181 of the Mississippi constitution of 1890 were drawn in question by the said Yazoo and Mississippi Valley Railroad Company, the said Illinois Central Railroad Company, the said Chicago, St. Louis and New Orleans Railroad Company, the said Canton, Aberdeen and Nashville Railroad Company, the said Stuyvesant Fish, and the said James T. Harrahan, on the ground of their being repugnant to the constitution of the United States and the fourteenth amendment thereto, in that in and by the said statutes and constitutional enactments the State of Mississippi denies to the said Yazoo and Mississippi Valley Railroad Company within its jurisdiction the equal protection of the laws, and that the decision of the said Supreme Court of Mississippi was in favor of the validity of the said statute.

* * * * * * *

IN WITNESS WHEREOF, I have hereunto subscribed my name this 2d day of March, in the year one thousand eight hundred and ninety-nine.

THOMAS H. WOODS,
Chief Justice Supreme Court.

In the special record many important documents are not included which ought to be considered by the court on this application. Thus we find omitted:

1. The certificate of the Chief Justice of Mississippi that a Federal question was involved below (Transcript, p. 690).
2. The assignment of errors under section 997 of the Revised Statutes (*Id.*, p. 700).
3. The charter of the Yazoo and Mississippi Valley Railroad Company, the principal defendant below (*Id.*, p. 45).
4. The second, third, fourth and fifth declarations (*Id.*, pp. 70, 99, 611, 622).
5. The pleas of the Yazoo and Mississippi Valley Railroad Company (*Id.*, p. 551).
6. The judgment of the Supreme Court on the first appeal (*Id.*, p. 512).

It has been generally understood as a settled rule of practice that if any material paper be omitted from a special record, thus compelling the court to refer to the whole transcript for an accurate understanding of the case, the motion to dismiss will be denied or its consideration deferred until the hearing on the merits. But, as the interests involved in this case are very large, the plaintiffs in error have felt forced to print the record itself for use on this motion, should the court desire to consult it.

In the brief of the argument of the defendant in error on the motion to dismiss, fifteen grounds are set forth. It is difficult to understand why most of these grounds are assigned. Many are based upon arguments that the plaintiffs in error obviously could not make in this court. In support of three of the grounds (10, 11 and 12) the court is asked to refer to certain summonses which are not in the transcript and were not before the court below. Indeed, the special record and the papers filed with it have been inartificially prepared,

and evidently in too much haste. Some of the grounds of dismissal have not a semblance of merit, and were obviously inserted as mere ventures in the hope that they might possibly be considered as furnishing color or excuse for the experiment of the motion. The court ought not to be thus unnecessarily burdened.[1]

I.

THE NATURE OF THE CONTROVERSY BELOW.

In 1870, when the legislation in question in this controversy was first enacted, the condition of the State of Mississippi was indeed miserable.[2] Her resources had been exhausted by the struggle and sacrifices of the Rebellion. The great revolution in industrial, agricultural and economic conditions resulting from the Civil War and the liberation of the slaves had left the community so poor that with difficulty could the inhabitants bear the burden of the taxes necessary for carrying on the local government. Millions of acres were forfeited to the State for non-payment of taxes. It seemed a paramount necessity that means of communication and transportation by railroads should be provided. The State could

---

1. The court is also asked to refer to several hundred folios of decisions of the state court not printed in the special record and is likewise referred to "our original brief on file, pp. 16, 17, 25-41," of which no copy was served on this application. There were three or four briefs filed in the state court. The plaintiffs in error are not apprised exactly what brief is referred to.

2. In *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 502, Mr. Justice JACKSON said: "In *Preston* v. *Browder*, 1 Wheat. 115, 120, it was said that in the construction of the statutory laws of a State it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason, as well as the meaning, of many of the provisions in them. * * * Legislative contracts, especially, should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail."

not undertake nor even aid their construction by bonds or taxation. The topography of the country was such that both the construction and maintenance of railroads were unusually difficult and expensive. Especially in the Mississippi Delta—that extensive region lying between Memphis and Vicksburg, on the one hand, and the Mississippi River and the bluffs east of the Yazoo, on the other—the country was a wilderness. Except for small areas along the fronts of the navigable rivers, it was waste and wild swamp—uncultivated, uncleared, unexplored, subject to annual inundations from the Mississippi. The levees had been swept away. The only chance or prospect of development and improvement was by inducing the investment of capital belonging to the inhabitants of other States and countries. Facing this condition of things, the legislature, in the exercise of what must seem to all candid minds a wise foresight, for the purpose of attracting foreign capital to an enterprise of very doubtful profit, undertook to induce investment in railroads, and thus to provide the necessary means of communication and transportation. It thereupon passed an act under which the State pledged the public faith and agreed as follows (Laws of 1870, ch. 104, sec. 21, entitled "An Act to incorporate the Mobile and Northwestern Railroad," approved July 20, 1870):

> "SEC. 21. *Be it further enacted*, That in consideration of the construction of the Railroads provided for herein, and of the great benefit which the State will receive in the developement of its agricultural resources by means of said Railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said Company (AND WHICH

AGREEMENT IS IRREPEALABLE),[1] that all taxes to which said Company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said Company may have incurred in the construction of said road, or for money borrowed by said Company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said Company in constructing the same; and it shall be the duty of the Tax Collector in every county in each and every year, to give to said Company a receipt in full for the amount of said taxes upon receiving from said Company an affidavit made by the President or Cashier of said Company, that the amount of said taxes have actually and in good faith been paid and applied by said Company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said Company shall be subject; *provided, however*, That, whenever the profits of said Company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said Company to the Tax Collector, to be by him paid over as required by law."

This provision was accepted by the railroad company and many millions of dollars were invested in the State upon the faith thereof. A large portion of the railroad now involved was built in reliance upon this act. As long as new railroads were necessary and construction continued with its consequent inpouring of foreign capital, the validity and inviolability of this statutory contract remained unchallenged. After twenty-

1. At the time the act of 1870 was passed, there was a general statute in Mississippi (Code of 1857, chap. 25, art. 5), which provided that the charters of all corporations should be repealable unless otherwise expressly provided in the charter. When the act of 1870 was passed and this right as to taxes was conferred, it was necessary that the above-quoted language should be inserted, in order to withdraw the act from the operation of the general statute as to repealability (*Shotwell* v. *Railway Co.*, 69 Miss. 541, 556).

eight years of acquiescence in the constitutionality of this legislation, the Supreme Court of Mississippi held last year that it was invalid from the beginning.

It will be fit and proper to appreciate at the outset that the State of Mississippi surrendered nothing in granting the privileges now stricken down as unconstitutional, and so vehemently criticised by the majority of the judges of her Supreme Court. Those privileges—call them exemptions or what you please—were not grants to existing corporations in order that taxpaying properties *in esse* might be relieved of their just share of taxation, but they were inducements held forth to attract capital from abroad, and thereby to create new property and value which at the time did not exist, but which would furnish a subject for taxation in the future. The legislature also had in mind the incidental, but far more important, result that the railroads so brought into being would develop the resources of the wilderness, and would create value and prosperity where waste, poverty and desolation then existed. And such has been the result.

The Railroad Companies have carried out their compact in overflowing measure. It was almost foolhardy to construct a railroad in the Delta region at that time, in view of the lack of levee protection, but it was done, and done in two years. Eight hundred miles of railroad, penetrating the wildest regions, have turned what was once a worthless and desolate wilderness into the finest portion of Mississippi. The State has gotten more than was bargained for. Yet it now repudiates the obligation, forgetting the unvarying experience and lesson of the past—that no community has ever, in the end, been a gainer by a breach of public faith.

The legislature of Mississippi in 1882 authorized the

creation of what became the Louisville, New Orleans and Texas Railway Company by the consolidation of certain existing companies. The act of 1882 expressly conferred upon the new company all the privileges of section 21, above quoted, by the following language (Laws 1882, p. 1013):

> "SEC. 5. *Be it further enacted*, That the provisions of the twenty-first section of an act entitled 'An Act to incorporate the Mobile and Northwestern Railroad,' approved July 20, 1870, is hereby made to *apply to the said consolidated company*, and for that purpose the said section is hereby declared to be part of this act, and this section shall be construed as though the said twenty-first section was specially and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this act."

The agreement embodied in section 21 was relied on by the L., N. O. & T. Company in the building of its railroad at great expense, and was the principal inducing cause for the investment of foreign capital within the State in its construction. This Company was consolidated in 1892 with the Yazoo and Mississippi Valley Railroad Company, which succeeded to all its rights. The Supreme Court of Mississippi now holds, among other things, that the rights under section 21 were lost by the consolidation, or, if not so lost, were unconstitutional and void from the beginning.

The State of Mississippi was also accustomed to grant exemptions from taxation. Indeed, at the session of 1882, at which was passed the act now relied on, the legislature incorporated the Yazoo and Mississippi Valley Railroad Company, and granted to it and fourteen other companies an express exemption from taxation upon compliance with certain conditions. This exemption from taxation was involved in the litigation before this

court in *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184, where the wording of the statute will be found. Many other instances of both classes of grants are set forth in the appendix.

Thus there were two distinct forms of legislative aid or contract in use in Mississippi, the one, as in the case of the Yazoo charter, granting an exemption from taxation, and the other, as in the charters of 1870 and 1882, agreeing to appropriate a certain amount, equal to the taxes, for the gradual reimbursement of the cost of construction. The State, therefore, clearly recognized the essential difference between the two forms of contract. It is also significant that the constitutionality of even the exemption from taxation, contained in the Yazoo Railroad Company's charter and those of many other roads, was for many years acquiesced in by all the courts and officials of Mississippi, and was never challenged previous to the case at bar. The court will recall that in *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184, Mr. Chief Justice FULLER, commenting upon this fact, said:

> "The Supreme Court of Mississippi did not put its decision upon the ground that it was not competent under the state constitution for the State to contract with the company that the latter should not be subjected to taxation."

All these contracts for exemption and the appropriation of taxes, upon the faith of which millions have been invested in Mississippi, are now to be torn up by the roots, and the State is to impair the obligation which it assumed and repudiate the contract which was made with investors. Surely there never was an instance presented to the court in which the protection of the contract clause of the Federal Constitution should more clearly

apply—never a case which came more completely within the very evil contemplated by the framers of the Constitution—never a case in which the plighted public faith has been more grossly broken and solemn obligations more indefensibly violated. That such a controversy essentially involves a Federal question of the gravest kind must be self-evident.

No extended argument is deemed necessary here upon the nature and effect of this contract. A few suggestions are, however, submitted in order to satisfy the court that the points are serious and that the questions warrant full argument upon the merits and the most careful consideration.

A.

Upon the merits, the plaintiffs in error expect that they will be able to convince this court that the contract for appropriation of taxes embodied in section 21 of the act of 1870 as re-enacted in 1882 did not constitute an exemption from taxation, but on the contrary was a contract and property right of such a character as survived the consolidation or merger of 1892. This distinction has been insisted on throughout the litigation, and is not an after-thought urged in this court for the first time. The prevailing opinion on the first appeal refers to the point in these words (transcript, p. 676):

> "There is a rather curious proposition of counsel for the railroad companies in his brief at pages 118 *et seq.* The argument is that what was provided by the 21st section of the North Western charter was not an *ordinary exemption* at all, although counsel admits that the Lambert case expressly so decided, but that it was a *contract* of *appropriation irrepealable* in its nature, and not an exemption at all."

The court below, however, refused to treat the contract

as differing in substance from an express exemption. But even if this court should hold that the contract does constitute an exemption, nevertheless the plaintiffs in error will contend and it is believed will satisfy the court that the exemption is a valid contract, "irrepealable" in the very language of section 21, and was not lost by the consolidation.

Section 21 not only does not in terms grant an exemption, but its purpose is entirely different. The railroad is left subject to all manner of taxation, and taxes to the amount of hundreds of thousands of dollars have been actually levied. The legislature simply agrees that all the taxes to which the railroad might be subjected for twenty-five years shall be appropriated and applied to the repayment or reimbursement of the cost of building. The act contemplates a regular assessment and levy of all taxes. The right to tax is reserved. Only when the amount is proved to have been applied as directed by law is the receipt or credit given. The amount to be specified in the affidavit can not be known until the tax had been imposed. The Railroad Company is not relieved or exempted from paying its taxes; it is merely permitted to pay them by applying the amount to payment of its construction debt in which the State and its inhabitants had a very direct and tangible interest. The act plainly contemplates the direct payment of the taxes assessed, in the usual and ordinary course, *unless* the company shall do, each year, two things—(1) pay an amount equal to the taxes on its construction debts, and (2) prove such payment by making the statutory affidavits. There is nothing in this transaction to show a surrender by the State of its taxing power. The amount of a tax has merely been appropriated for certain purposes which are undoubtedly public in character. The legisla-

ture could with perfect propriety have granted aid for these purposes to any given amount and for any specified term, and could have provided that a certain amount should be paid each year. The effect would have been the same as that accomplished by this act.

The State could indisputably appropriate, or agree to appropriate, say $100,000 a year to reimburse and pay for the cost of constructing a railroad as a public work of internal improvement. Instead of doing that, a contract was made with the bond and stockholders of these railroads, that, if they would loan the money and make the necessary advances for building the road, part of the cost would be repaid to them gradually out of a special fund made up of taxes on the very property the owners were creating, and in an annual amount equal at least to the taxes actually imposed. The State thus risked absolutely nothing.

A broad distinction must be observed between an ordinary bare exemption from taxation discussed in most of the cases, and a contract such as that involved in this case, by which the State appropriates, in aid of public improvements, the proceeds of a tax regularly levied and collected. Unless restrained by some specific inhibition of the state constitution, the legislature had full power to grant moneys for any public improvement. There was no such inhibition in the Mississippi Constitution of 1869, nor in that of 1890. The Supreme Court of Mississippi has repeatedly declared the doctrine that the building of a railroad is a public use, in aid of which taxes may be laid (*Brown* v. *Beatty*, 5 George, 227, 240; *Hawkins et al.* v. *Carroll Co.*, 50 Miss. 735, 757; *New Orleans, &c., R. R. Co.* v. *McDonald*, 53 Miss. 240, 245; *Miss. Const.* 1869, Art. 12, Sec. 14). The same rule has always been held in this court, and prevails throughout this country (*Rogers*

v. *Burlington*, 3 Wall. 654, 663; *Thomson* v. *Lee County*, 3 Wall. 327, 330; *Mitchell* v. *Burlington*, 4 Wall. 270, 273; *Railroad Company* v. *County of Otoe*, 16 Wall. 667, 672; *Olcott* v. *The Supervisors*, 16 Wall. 678, 694; *Sharpless* v. *Mayor of Philadelphia*, 21 Pa. St. 147, 169; *Thomas* v. *Leland*, 24 Wend. 65, 68; *Napa Valley R. R. Co.* v. *Napa Co.*, 30 Cal. 435, 437; *Stein* v. *Mayor of Mobile*, 24 Ala. 591, 614).

In *Pacific Railroad Company* v. *Maguire*, 20 Wall. 36, 44, an absolute exemption from taxation for a limited period had been conferred upon a railroad company. Subsequently, the people of the State adopted, as part of the state constitution, an ordinance taxing the gross receipts of the company and providing that the proceeds of the tax should be appropriated to the payment of certain bonds of the State lent by it to the company, and upon which, as between the State and itself, the company was liable. It was claimed that this legislation did not impose a tax, as such, since it merely applied the income of the company to the payment of debts which were alike debts of the State and of the company (argument for defendant in error, 20 Wall. 41). The court held that the ordinance in question clearly imposed a tax. This case is express authority for the proposition that, in the case at bar, section 21 in fact provides for taxation as such and for nothing else, and does not exempt the Railroad Company from taxation notwithstanding the appropriation of the tax to the payment of its construction debt.

The practical effect of the contract of appropriation was not only to confer a present benefit upon the State through the general increase of property and values flowing from the construction of the road and payment for a

public improvement without cost to the State, but also to confer a future benefit by adding to the taxable wealth of the State this particular property, with diminished debt, and, consequently, more valuable and subject to greater taxation. Necessarily, the net earnings of of such a company would be increased by the payment of so much of its debt. Another and greater public benefit would accrue from the fact that the reimbursement of the construction debt would put it in the power of the State to compel lower rates of carriage. (*Smyth* v. *Ames*, 169 U. S. 466, 546).

In other words, the State, by the contract under consideration, undertook to aid in the repayment of the construction debt, and this undertaking tended directly to induce and secure the actual construction of the road. In fact, the builders of the railroad were advancing the amount of the taxes in order to construct a public improvement, for the construction of which the whole community might properly have been taxed. The owners of the railroad remained liable for taxes certainly to the full amount and probably to an increased amount because of the increased value of their property resulting from the gradual payment of the construction debt. Not a dollar of taxation was exempted or remitted. The State did nothing to impair or diminish its resources or funds. The only sum appropriated consisted of taxes levied upon property which, but for the appropriation, might never have existed. In this indirect way there was accomplished what no one can doubt might have been accomplished by a direct and undisguised grant of state funds.[1]

1. The State in 1871 passed a subsidy act (ch. 359) donating $4,000 per mile to any railroad building in the State.

B.

The next point to consider upon the merits is whether the benefit of the contract for the appropriation of taxes, or exemption, if it be so held, was lost by the consolidation agreement of 1892 (special record, p. 3). The general rule is well settled that the rights, privileges and contract rights of consolidating corporations pass to and are vested in the consolidated company, and that tax exemptions are lost only when a new corporation is created by the consolidation.

In the case of *Railroad Co.* v. *Lambert*, 70 Miss. 779, 790, decided in 1893, the Supreme Court of Mississippi expressly upheld the contract rights of the plaintiffs in error and decided that they had not been lost by the consolidation, viz.:

> "We think it clear that the immunity possessed by the Natchez, Jackson & Columbus Railroad Company was not lost by its sale *and consolidation*, which was expressly authorized, and that, as to this, everything remained as before.[1]
>
> "By their charters, the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, were empowered to consolidate, and *the immunity claimed by the Louisville, New Orleans & Texas Railway Company, for the right to pay taxes on what was the Natchez, Jackson & Columbus Railroad Company was not lost by its merger in the Yazoo & Mississippi Valley Railway Company, but it went into that company with all its rights, privileges and immunities, as far as could be in the merger, and nothing was lost thereby, except as necessarily resulted from the union.*"

The effect of the merger upon the contract between the State and the Railroad Company is entirely different from what it would have been upon a mere im-

1. That is, the consolidation later between the L., N. O. & T. and the Y. & M. V.; for there never was any consolidation between the N. J. & C. and any other company.

munity or exemption from taxation. This grant or appropriation is not an immunity or exemption, but is a contract right under which the Railroad Company had the privilege of paying its taxes in a specified manner. If it does not see fit to pay off any part of its construction debt, it still must pay the taxes; but it is not exempted from paying in one form or another the full amount of the taxes whatever they may be—that is, either to the tax collector or to the persons to whom it is indebted for construction. The case is analogous to those which deal with the effect of consolidation upon ordinary property rights, privileges and contracts, rather than to those which are limited to the consideration of the effect of consolidation or merger upon special statutory exemptions from taxation.

In *County of Scotland* v. *Thomas*, 94 U. S. 682, 693, it was held, following certain decisions of the Supreme Court of Missouri, from which State the case came, that a charter to a railroad company, giving counties the right to subscribe for stock of the company, conferred a right and privilege upon the railroad company which passed upon consolidation to the consolidated company. A subsequent constitution of the State had declared that no county should become a stockholder in, or loan its credit to, any corporation without the assent of two-thirds of the voters, but it was held that this language was prospective, and that the right and privilege of the existing company to receive such subscriptions was not affected by it. The case is particularly in point because the new constitution—as in the case at bar—was adopted after the charter and before the consolidation; that is to say, the charter was granted in 1857, the new constitution was adopted in 1865, and the consolidation was authorized in

1869. In delivering the opinion of the court, Mr. Justice BRADLEY said:

> "The power was sought at the hands of the legislature, and was given. It was relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributory and necessary to its success as the prospective right to take tolls. Why it should not still attach to this portion of the road, as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see. * * * Subscription to the stock was not only a power of the county, but a privilege to the company,—being a portion of the rights and privileges which it obtained by translation from the charter of the North Missouri Railroad Company. * * * The power of the counties to subscribe being thus held to be a right and privilege of the company, in our opinion, passed with its other rights and privileges into the new conditions of existence which the company assumed under the consolidation."

To the same effect see: *Town of East Lincoln* v. *Davenport*, 94 U. S. 801, 805; *County of Henry* v. *Nicolay*, 95 U. S. 619, 626; *County of Schuyler* v. *Thomas*, 98 U. S. 169, 173; *Wilson* v. *Salamanca*, 99 U. S. 499, 504; *Empire* v. *Darlington*, 101 U. S. 87, 91; *Menasha* v. *Hazard*, 102 U. S. 81, 95; *Harter* v. *Kernochan*, 103 U. S. 562, 573; *County of Tipton* v. *Locomotive Works*, 103 U. S. 523, 537; *New Buffalo* v. *Iron Co.*, 105 U. S. 73, 76; *Livingston County* v. *Portsmouth Bank*, 128 U. S. 102, 114; *Denison* v. *Mayor, etc., of City of Columbus* (District of Mississippi), 62 Fed. Rep. 775, 777; S. C., affirmed in Circuit Court of Appeals, 69 Fed. Rep. 58, 60.

In *Green County* v. *Conness*, 109 U. S. 104, 106, it was held that where the act authorizing consolidation did not expressly declare that the rights, privileges and franchises of the consolidating company should pass over to

the company with which it might become consolidated, but only that it might consolidate "with any other company upon such terms as may be deemed just and proper,"[1] the new company, nevertheless, acquired the right to receive subscriptions belonging to the consolidating company. Mr. Justice BRADLEY said:

> "* * * When two companies are authorized to consolidate their roads, IT IS TO BE PRESUMED THAT THE FRANCHISES AND PRIVILEGES OF EACH CONTINUE TO EXIST IN RESPECT TO THE SEVERAL ROADS SO CONSOLIDATED. This point was considered in the case of *Tomlinson* v. *Branch*, 15 Wall. 460, and *Branch* v. *City of Charleston*, 92 U. S. 677, and was decided in accordance with this view. This being so, the authority given to consolidate, 'upon such terms as may be deemed just and proper,' would include the power to transfer to the consolidated company the franchises and privileges connected with the road, if the law itself did not have that effect."

In *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, 305, Mr. Justice BROWN said:

> "In the numerous cases which have arisen in this court as to the effect of a consolidation upon the existence and status of the constituent corporations, it has been held that the question of the dissolution of such corporations depended upon the language of the statute under which the consolidation took place—the presumption in each case being that each of the two lines of road will be held respectively to the privileges and burdens originally attaching thereto. *Tomlinson* v. *Branch*, 15 Wall. 460. If, upon the one hand, the identity of the prior corporations is preserved, an exemption from taxation, which one of them possessed, falls to that portion of the new corporation to which, under its former name, it had been attached. If, upon the other hand, the consolidation worked a dissolution of the prior corporations, their former privileges and franchises also ceased to exist."

1. Almost the same words as are used in the act of August 8, 1870.

The *Keokuk* case did not overrule *Tomlinson* v. *Branch*, 15 Wall. 460; *Central Railroad, etc., Co.* v. *Georgia*, 92 U. S. 665, and the other cases to the same effect.[1] These decisions are directly in point in the case at bar and should govern the branch of the case relating to the effect of the consolidation.

The true test in consolidation cases, when considering exemptions from taxation, is to inquire whether or not the prior corporations were absolutely dissolved and a new corporation created, so that it can be said that the privileges, immunities and franchises of the prior corporations ceased to exist. The presumption is that each of the consolidating lines of railroad continues entitled to any privilege or exemption attached to it. In order to rebut this presumption, it must appear that the consolidation "worked a dissolution of the prior corporations." The determination of this question clearly depends "upon the language of the statute under which the consolidation took place." If this language necessarily created a new company, then it may be said that the exemptions from taxation of the old corporations ceased to exist, but never has it been held that other contract rights of the constituent corporations disappear. In the case at bar, the language of the Mississippi statutes authorizing the consolidation not only did not work a dissolution of the consolidating companies, but, as matter of fact, did not authorize or sanction the creation of any new corporation. No new corporate franchises sprang into existence; no new capital stock was created; no new corporate entity arose. There was simply

1. *Philadelphia and Wilmington Railroad Co.* v. *Maryland*, 10 How. 376, 393; *The Delaware Railroad Tax*, 18 How. 206, 227; *Southwestern Railroad Company* v. *Georgia*, 92 U. S. 676; *Green County* v. *Conness*, 109 U. S. 104, 106; *Tennessee* v. *Whitworth*, 117 U. S. 139, 145.

a merger or transfer of the property and franchises of one corporation into another existing corporation, as was the case in *Tomlinson* v. *Branch*, 15 Wall. 460, and *Central Railroad, etc., Co.* v. *Georgia*, 92 U. S. 665. The mere use of the word "consolidation" in the statute or consolidation agreement signifies nothing,[1] for it was used in all the cases in which the court has held that even exemptions from taxation survived. And it is immaterial that in some other State a new corporation *quoad* that State was created. We are dealing solely with the legislation of Mississippi. Did it authorize and contemplate a new corporation, and was that the effect of the merger agreement in Mississippi? Clearly not, if we correctly construe the statutes which authorized the consolidation of 1892.

The power of the L., N. O. & T. Company to consolidate was contained in section 16 of the act of August 8, 1870, originally incorporating the Memphis and Vicksburg Railroad. This right passed to the L., N. O. & T. Company under the consolidation authorized by the act of 1882. The statute of 1870 provided:

> "That said Company shall have the right and power to consolidate the stock, property, and franchises of the road with any other road or roads, in or out of this State, at any time that the President and Directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said Company."

The authority conferred upon the Yazoo Company to consolidate, and under which the consolidation on its part was effected, was contained in the act of February 17, 1882, as follows:

> "Said company may consolidate with any other railroad company in or out of the State of Mississippi upon

1. Morawetz on Corporations, Sec. 942, p. 900.

such terms as the consolidating companies may agree upon."

The two companies thereupon agreed to consolidate upon the following terms (special record, pp. 3, 4):

> "ARTICLE 1. Such consolidation shall be effected by uniting or merging the stock, property and franchises of the party of the first part, with and into the stock, property and franchises of the said Yazoo & Mississippi Valley Railroad Company, without disturbing the corporate existence of the last named company, or the formation of any new distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective.
>
> "ARTICLE 4. Any holder of the stock of either of the said companies now outstanding shall be entitled to cast one vote for each share of stock held by him at all stockholders' meetings of the consolidated company, which vote may be cast either in person or by proxy, and shall have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor, and in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable at par for the new outstanding shares of each of the constituent companies, and the remainder of the capital stock of the consolidated company shall be issued from time to time, and upon such terms and conditions as may be prescribed by the Board of Directors of said Company.
>
> "ARTICLE 5. All and singular the rights, powers, privileges, immunities and franchises, and all the railroads, real and personal estate, easements, fixtures, equipments, choses in action and property, and assets of any kind, nature or description, belonging to either of the parties hereto, shall be vested in and become the property of the said consolidated company, without any further act, deed, conveyance or assurance being required in the premises."

It is confidently asserted that the plaintiffs in error will be able to convince this court by an oral argument on

the merits that all contract rights and exemptions from taxation survived the consolidation of 1892; and that the decision of the *Lambert* case, in 1893, was correct and should not have been overruled.

II.

As to the Federal question involved.

The Supreme Court of Mississippi decided five points, each of which involved a Federal question. In order that there may be no possible dispute as to this, we shall quote the language of the brief of the defendant in error on this motion as to the grounds of the decision below (pp. 10, 11), viz.:

> "In these consolidated causes the Supreme Court of Mississippi decided five things:
>
> 1st. That the legislature could not grant an exemption to a railroad company by name as such under said Constitution of 1869.
>
> 2d. That it could not grant an irrepealable exemption under said Constitution.
>
> 3d. That a new company was formed by the consolidation of October 24, 1892, and no exemption passed into it.
>
> 4th. That, if the consolidation was a technical merger, still Section 180 of the Constitution of 1890 prevented any exemption from passing into it.
>
> 5th. That any alleged exemption was repealed by the acts of 1884, 1886 and 1890."

Each of these grounds of decision obviously involved a Federal question, namely, (1) whether or not there was a contract to be protected from impairment, and (2) whether or not its obligation had been impaired. This is not a case in which a sufficient ground of decision exists other than the Federal question, for the validity and present existence of the legislative contract was the only question involved.

A memorandum as to the subsequent tax legislation given effect by the judgment below is printed in the appendix.

The theory of the defendant in error evidently is that the nature of the contract and its repealability are questions upon which this court, whatever its own opinion may be, must take the view of the court below, because the construction of the constitution and statutes of Mississippi is in some measure involved. It is urged by him that the case comes within the general rule that this court adopts the construction of state laws by state courts; but the one exception to this rule, namely, when the contract clause of the Federal Constitution is involved, has been overlooked by counsel, although but recently reiterated in *Douglas* v. *Kentucky*, 168 U. S. 488, 500; *McCullough* v. *Virginia*, 172 U. S. 102, 109; and *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 484.

In all cases arising under the contract clause of the Federal Constitution, it is the prerogative and duty of this court to inquire and judge for itself (1) whether a contract has or has not been made and is still in existence; and (2) whether the obligation of that contract has been impaired. In cases involving rights which do not arise under the contract clause of the Federal Constitution, this court may follow the decisions of the state courts as to the construction of local constitutions and laws; but whenever the Federal question arises under the contract clause, the construction of the local constitutions and laws is a matter which must be determined by this court according to its own views.

If this doctrine be applied, there will be no difficulty in perceiving that each of the five grounds of decision below clearly presented a Federal question under the contract

clause. Thus, the first two grounds of the decision—that the legislature had no power to grant an exemption — necessarily involved the question whether a contract had been made; the third ground presented the question whether the contract so made had been waived by consolidation proceedings, or, in other words, whether the contract still existed; the fourth ground gave effect to the new state constitution which was adopted eight years after the contract was made; and the fifth ground was based on an alleged repeal of a contract right which the plaintiffs in error claimed was irrepealable.

The state court could not have held the plaintiffs in error liable for the taxes in suit without deciding either (1) that the provision of section 21 did not constitute a contract, or that that contract had been waived, surrendered or abrogated, or (2) that the subsequent tax legislation of the state did not impair the obligation of that contract.

Willson and others v. *The Black Bird Creek Marsh Company*, 2 Pet. 245, 250; *Satterlee* v. *Matthewson*, 2 Pet. 380, 410; *Harris* v. *Dennie*, 3 Pet. 292, 301; *Craig et al.* v. *The State of Missouri*, 4 Pet. 410, 429; *Lessor of Fisher* v. *Cockerell*, 5 Pet. 247, 255; *Crowell* v. *Randell*, 10 Pet. 368, 392; *Armstrong et al.* v. *The Treasurer of Athens County*, 16 Pet. 281, 285; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 141; *Furman* v. *Nichol*, 8 Wall. 44, 55; *Edwards* v. *Elliott*, 21 Wall. 532, 550; *Murray* v. *Charleston*, 96 U. S. 432, 441; *Smith* v. *Greenhow*, 109 U. S. 669, 670; *Chapman* v. *Goodnow*, 123 U. S. 540, 546; *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 555; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 334; *Chicago, Burlington, &c., R'd*, v. *Chicago*, 166 U. S.

226, 231; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S., 613, 621.

As Chief Justice WAITE said in *Chapman* v. *Goodnow*, 123 U. S. 540, 548:

> "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

The defendant in error contends that, even if a valid contract was made providing for the appropriation of taxes for a particular public purpose, nevertheless the court below held that this contract right was lost by the consolidation of 1892, and, further, that this decision of the court below as to the effect and result of the consolidation "is merely a construction by the state court of its own local laws, and raises no Federal question" (defendant's brief, p. 25). In other words, the position is that the decision of a state court, as to whether a contract is still in existence or has been waived, is conclusive upon this court. This is not the rule. This question as to the existence of a contract as well as its true construction has been in all cases determined by this court independently of the decisions of the state court, and in some cases in direct opposition to the rulings of those tribunals: *Ohio Life Insurance and Trust Company* v. *Debolt*, 16 How. 416, 432; *Jefferson Bank*, v. *Skelly*, 1 Black 436, 443; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 145; *Delmas* v. *Insurance Company*, 14 Wall. 661, 668; *Railroad Companies* v. *Gaines*, 97 U. S. 697, 709; *University* v. *People*, 99 U. S. 309, 321, 323;

Wright v. *Nagle*, 101 U. S. 791, 793; *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244, 256; *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398, 399; *Vicksburg, &c., Railroad Co.* v. *Dennis*, 116 U. S. 665, 667; *Given* v. *Wright*, 117 U. S. 648, 655; *N. O. Water Works* v. *La. Sugar Co.*, 125 U. S. 18, 38; *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184; *McGahey* v. *Virginia*, 135 U. S. 662, 669; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293; *Bryan* v. *Board of Education*, 151 U. S. 639, 649; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492; *Shelby County* v. *Union &c. Bank*, 161 U. S. 149, 151; *Phœnix Insurance Co.* v. *Tennessee*, 161 U. S. 174, 185; *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *McCullough* v. *Virginia*, 172 U. S. 102, 109; *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 487.

In a number of the foregoing cases motions were made to dismiss upon the ground that the construction by the state court of its own constitution and laws was binding upon this court, but in every instance the motion to dismiss was denied. In *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184, a motion to dismiss was made upon the same ground as that urged in the case at bar. In overruling the motion, Mr. Chief Justice FULLER said:

> "The taxes in question were assessed under the act of 1888, and if the charter of the company, which became a law on the 17th of February, 1882, inhibited such taxation, then this court has jurisdiction to re-examine the conclusion reached. Although by the terms of the act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the company.

> The result is the same, although the act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for if the contract existed those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is therefore overruled."

In *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, which is the latest case involving the effect of consolidation upon an antecedent right of exemption from taxation, a motion was made to dismiss the case upon exactly the same ground as that assigned in the case at bar—namely, that the determination of the state court as to the effect of consolidation was a construction by the state court of its local constitution and laws, and was therefore binding upon this court; yet this court denied the motion to dismiss, and considered and determined the whole question upon the merits. This case is on all fours with the case at bar, and affords a valuable precedent in support of jurisdiction[1].

In no class of cases has this court oftener exercised its power to determine for itself the existence of an alleged contract than in the long line of decisions involving so-called exemptions or immunities from taxation.

The inquiry as to whether a consolidation has resulted in a loss of any exemption or privilege or immunity of the prior corporations, has always been deemed by this court to be essentially a Federal question. From the case of *Tomlinson* v. *Branch*, 15 Wall. 460 (1872), until the present time, never has this court considered itself bound in any way by the construction of the state

---

1. The disposition of the motion in the *Keokuk* case is not reported, but the records in the clerk's office show that the motion was submitted March 23, and denied March 30, 1891.

courts of the statutes authorizing the consolidation.[1] Therefore, even if the state court had only decided that the rights acquired under section 21 had been lost by consolidation and that a contract no longer existed, it would have clearly rendered a decision upon a Federal question, pure and simple.

III.

AS TO THE FIFTEEN GROUNDS OF DISMISSAL STATED IN THEIR ORDER.

For the sake of convenience, the various grounds of the motion to dismiss will be considered in their numerical order. This method of treatment necessitates some repetition and a longer argument than otherwise would be justifiable; but it is unavoidable.

1

THE FIRST GROUND.

The first ground of the motion to dismiss is that the Federal question was not raised at the proper time or in the

1. The following cases involved the creation of the alleged contract: *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 532; *Chesapeake, etc., R. R. Co.* v. *Virginia*, 94 U. S. 718, 722; *Railroad Companies* v. *Gaines*, 97 U. S. 697, 707; *Railroad Co.* v. *Commissioners*, 103 U. S. 1, 3; *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398; *Vicksburg, &c., Railroad Co.* v. *Dennis*, 116 U. S. 665, 667; *Chicago &c., Railroad* v. *Guffey*, 120 U. S. 569; S. C., 122 U. S. 561; *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184; *McGahey* v. *Virginia*, 135 U. S. 662, 667; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293; *Bryan* v. *Board of Education*, 151 U. S. 639, 650; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 139; *Phœnix Insurance Co.* v. *Tennessee*, 161 U. S. 174, 175; *Douglas* v. *Kentucky*, 168 U. S. 488, 495; *Chicago, &c. Railroad* v. *Nebraska*, 170 U. S. 57, 68; *McCullough* v. *Virginia*, 172 U. S. 102, 109.

In the following cases, the court determined for itself whether or not there was still an existing contract or whether the rights acquired thereunder had been waived or in any way lost or surrendered: *Morgan* v. *Louisiana*, 93 U. S. 217, 219; *Railroad Co.* v. *County of Hamblen*, 102 U. S. 273, 275; *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244, 256; *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609, 617; *St. Louis, &c., Railway Co.* v. *Berry*, 113 U. S. 465, 472; *Chesapeake & Ohio Railway Co.* v. *Miller*, 114 U. S. 176; *Given* v. *Wright*, 117 U. S. 648, 655; *Keokuk & Western Railroad Co.* v. *Missouri*, 152 U. S. 301, 305; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492; *St. L. & San Francisco Railway* v. *Gill*, 156 U. S. 649, 656; *Nor. & Western Railroad* v. *Pendleton*, 156 U. S. 667, 673; *Mercantile Bank* v. *Tennessee*, 161 U. S. 161, 171.

appropriate way. The contention seems to be that the question must be expressly "pleaded." In support of this ground, reliance is placed upon many cases belonging to the third class mentioned in section 709 of the Revised Statutes, in which the final decree of a state court may be re-examined in this court. The jurisdiction in the case now before the court is, however, under the second class. It is, of course, well established that in cases which belong to the second class—that is to say, where "is drawn in question the validity of a statute of, or an authority exercised under a statute of, any State on the ground of its being repugnant to the Constitution," etc.—it is not necessary that the Federal question should be specially set up or claimed in order to give this court jurisdiction, but it is sufficient that it appear that the Federal question was involved in the case, and that the case could not have been determined without deciding it. This well-established rule of practice has been most emphatically reiterated at the present term in *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 485, in which case Mr. Justice BROWN, in referring to a state of facts quite analogous to those now presented, used the following language:

> "While no special mention is made in the complaint of the Constitution of the United States, the whole theory of the plaintiff's case, taken in connection with the answer is that the rights which it acquired to the five hundred horse-power in question under the act of 1887 were impaired by the subsequent act of December 24, 1892, ratifying and approving the contract of the board of directors of the state penitentiary with the defendant. The contract of the defendant is set up in the complaint, and although the act of December, 1892, ratifying the same is not set up there, it appears in the answer and is relied upon as validating the contract; so that, reading the complaint and answer together, the question whether the contract of the plaintiff was impaired by subsequent

state action appears on the face of the pleadings. * * *

"While, in so holding, the court disposed of the case upon the construction of the contract under which the plaintiff asserted its right, such construction is no less a Federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant did not impair it. The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no contract at all, or that the plaintiff had no exclusive rights under its contract, or granting that it had such exclusive rights, that the subsequent legislation did not impair it. These are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very recent case of *McCullough* v. *Virginia*, 172 U. S. 102, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question *N. O. Water Works* v. *La. Sugar Co.*, 125 U. S. 18; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116.

"TO THE ARGUMENT THAT THE FEDERAL RIGHT WAS NOT 'SPECIALLY SET UP AND CLAIMED' IN THE LANGUAGE OF REVISED STATUTES, SECTION 709, IT IS REPLIED THAT THIS IS NOT ONE OF THE CASES IN WHICH IT IS NECESSARY TO DO SO."

A.

In the case at bar, the very statutes relied upon by the Railroad Companies, defendants below, were set forth by appropriate reference in the declaration or complaint (special record, pp. 22, 23), and the declaration prayed "that they be considered as part of this declaration." Among the statutes referred to is the one constituting the contract upon which these plaintiffs in error relied. Therefore, upon the face of the declaration or complaint the charter contract was brought before the court for adjudication. The question of its validity and the plaintiff's right

5460

to recover taxes already paid in the manner provided in the act, could, of course, have been fully raised by demurrer if the facts showing compliance with the statute had been alleged. As the charter was thus brought before the court, it was not necessary to plead it again in the answer, and all that was done was to allege the facts which brought the defendants within the provisions of the statutes. This allegation was made in almost the very language of the statute. To this defense the plaintiff demurred, and this was one of the issues presented on the first appeal. It is, therefore, evident that on the face of the pleadings, the validity of the statute was necessarily involved. Moreover, we have the statement of the defendant in error in the brief now submitted on the motion to dismiss—that there were five grounds of decision in the court below; and each one of these grounds involved the validity or impairment of the contract. In addition to this concession, we also have, in the defendant's brief on this motion, another admission that the original pleadings did raise or involve the Federal question (pp. 28, 29), viz:

> "But the pleadings show that the defendants had full notice that these points were being made and pressed, from the inception of the litigation. One of the grounds of the demurrer to their plea, which recited in detail a full compliance with the requirements of this 21st section, was that "said plea is no defense."
>
> "The fifth and sixth replications to this plea claimed that the exemption was lost in the consolidation and cut off by the Constitution of 1890.
>
> "The charges asked by plaintiff to the jury were among others a peremptory instruction, and specific charges on the effect of the consolidation; among the errors assigned in the motion for a new trial was the overruling of these contentions, and so among plaintiff's assignments of errors in the Supreme Court; and the

> points were all made in the brief of plaintiff in the Supreme Court, so that these points were openly and continuously pressed, and it is idle for defendants now to claim any surprise, or that they never had any opportunity to plead Section 10, Article I, or the 14th Amendment of the Constitution of the United States. They must plead at the *proper time* and in the *appropriate way*."

The plaintiff below moved on the second trial to strike out the pleas of the Railroad Companies which set forth at greater length the Federal question. The motion was made in part upon the following grounds (special record, p. 183):

> 3. "Because all of the defenses set up in said pleas can be set up under their pleas filed prior to the filing of these pleas.
>
> 4. Because all matters [*i. e.* the Federal question] set up in said pleas have been adjudicated against said defendants in this case by the Supreme Court."

B.

Even were this not a case of the second class and were it a case within the third class—that is, involving a right, title, privilege or immunity under the Constitution—the court would nevertheless hold that the Federal question had been duly raised, and that the right, title, privilege or immunity had been specially set up or claimed in a proper way and in ample time. *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 579; *Spencer* v. *Merchant*, 125 U. S. 345, 352; *Kaukauna Co.* v. *Green Bay, &c., Canal*, 142 U. S. 254, 269; *Roby* v. *Colehour*, 146 U. S. 153, 159; *Powell* v. *Brunswick County*, 150 U. S. 433, 439; *Chicago, Burlington, &c., R'D* v. *Chicago*, 166 U. S. 226, 231; *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 66.

When the Supreme Court of Mississippi overruled its prior decisions and announced a new construction of its constitution, the Railroad Companies at once filed a

suggestion of specific errors before final judgment was entered (special record, p. 102), specially setting up and claiming the contract right under the Federal Constitution.[1] Under the local practice, they were entitled as of right to have these suggestions considered, and determined before the issuance of a mandate to the court below. This is, therefore, a case in which a party is entitled as of right to suggest errors, and to invoke the decision of the court thereon. The practice is not at all similar to an application for a rehearing, which depends upon discretion, for the right to have an adjudication upon the suggestion of errors is given absolutely. The difference is distinctly recognized in the rule printed on the margin.[2] Besides, in all the cases which hold that it is too late to raise the Federal question on an application for a rehearing, the application was made after the very decision sought to be reviewed and not after a decision on a first appeal, on which no final judgment could be entered, and from which error would not lie to this court. The result of the first appeal in this case was not a final judgment or even a mandate directing proceedings such as an accounting.

---

1. The suggestion of errors was filed June 27, 1898, and the full opinion of the Supreme Court of Mississippi was not filed until November 22, 1898. Thus the court below had the suggestion of errors before it for five months and undoubtedly considered it in preparing the definitive opinion on the first appeal.

2. Under the practice in the Supreme Court of Mississippi, there is a clear distinction between a petition for a reargument and a suggestion of error, the latter being presented to and considered by the court as of right. Rule 10 of the Supreme Court of Mississippi is as follows: "Petition for re-argument—suggestion of error. Applications for re-argument shall be presented in open court by petition, and noted on the minutes of the court on or before the Monday succeeding the delivery of the opinion; and no re-argument shall be granted upon any point or question not distinctly made and insisted upon at the original hearing or submission of the cause. No extension of the time for making such application will be granted except on account of sickness or other extreme cause. The court will, at anytime during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper" (70 Miss. XXII.).

The language was: "The judgment is reversed both on the appeal and the cross-appeal, and the verdict set aside, and the cause remanded for a new trial" (see transcript, p. 676, but not printed in special record). Either party on such new trial could make any point and advance any argument within the pleadings.

On the new trial directed by the appellate court, the Railroad Companies attempted specially to set up and claim the protection of the Federal Constitution, although it was really sufficiently raised under the pleadings as they stood. This was done out of extreme prudence and in order to narrow the real issue. The local court struck out the pleas as presenting no defense, and this ruling was sustained by the appellate court. But whether an amended answer or plea could under the local practice be then set up, is immaterial. The question is whether this court will consider that the Federal question has been duly set up or claimed, when, as in this case, upon a *new trial on the issues and merits*, the party specially sets up and claims the right and it is overruled and denied by the trial court as presenting no defense, which ruling is duly excepted to and is subsequently affirmed by the highest state court on the same ground. Of course, no particular form of words need be used in order to raise the Federal question, nor is it necessary that it shall be raised in the original pleading or in any pleadings or at any particular time (*Dewey* v. *Des Moines*, 173 U. S. 193, 199). All that is necessary is that before final judgment below there shall be "something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party." It affirmatively appears by the record before this court, in

addition to the certificate of the Chief Justice of Mississippi, that the Federal question was raised before final judgment in the appellate court on the first appeal and months before its final opinion was delivered; that it was specially set up and raised in the court of original jurisdiction on the new trial; and that it was likewise before the Supreme Court of the State on the appeal from the judgment now before this court.

C.

Under the first ground of dismissal, it is also urged (defendant's brief, p. 12) that, as this is a writ of error from a second appeal to the state supreme court, the rule is that what could have been examined and decided on the first appeal is *res adjudicata* and cannot be re-examined on a second trial or on a second appeal. It is quite true, as we have seen, that the Federal questions could have been examined and decided on the first appeal, and, as matter of fact, they were actually examined and decided. But, even if this were not so, does it in any way affect the questions here? It is the statutory right of a defendant in Mississippi to amend his pleadings and set up new defenses at any time before verdict. (*Railroad Co.* v. *King*, 69 Miss. 852; *Taylor* v. *Chickasaw Co.*, 74 Miss. 23; *Millsaps* v. *Bank*, 71 Miss. 361, 378.) The Mississippi cases cited on page 12 of the defendant's brief are not to the contrary. The rule is well established that, where a new trial is ordered upon the merits—not as in *Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103, simply to take an accounting—the whole case is open to a defendant or plaintiff to make any point that may properly be presented under the original or amended pleadings.

But the point is certainly without force as respects the taxes of 1896 and 1897. As to these taxes, the Railroad Companies had but one hearing in the circuit court and but one appeal to the state supreme court. When the suits were consolidated on July 4, 1898 (special record, p. 117), there had been no adjudication by the appellate court respecting these taxes; it was therefore the duty of the circuit court to receive and consider any defense which might be asserted to these taxes, irrespective of the action of the state supreme court in other cases.

As to these taxes of 1896 and 1897, therefore, the proceedings in July, 1898, were the first and only trial. The consolidation order expressly preserved all rights. Thus (p. 118):

> "This order is made to save expenses and inconvenience of separate pleadings and trial in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved, which would be reserved if said orders, proceedings and pleadings were all separate."

This court is asked, nevertheless, to hold that the practical effect of the consolidation order was to deprive the defendants of a ground of defense because that point was not made on the trial of the first three cases.

Nor is the case of *Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103, applicable. In that case it was claimed that a right or title under the United States was involved, which, however, was not set up or claimed until after a decision in the state supreme court on the merits settling all the questions. There was no new trial awarded, but simply an accounting, and, as this court pointed out (at p. 112), "there was no contention that any Federal question arose on the accounting itself." In the case at bar, the Federal question was necessarily involved in a new trial on the merits.

2.

THE SECOND GROUND.

The second ground of dismissal is based upon the withdrawal of certain pleas, and the entry of a judgment *nil dicit*.

Immediately upon the filing of the mandate ordering a new trial, the defendants below (plaintiffs in error here) asked for time in which to prepare additional pleas, and the court granted the application (transcript, p. 608). Thereupon the pleas were prepared, and were actually filed in open court in the presence of counsel for the defendant in error, and without objection (*Ib.*). The pleas thus appear, as stated in the special record (p. 551), to have been filed after "leave of the court had been first obtained." These pleas set forth in full detail the Federal questions involved. The plaintiff thereupon moved to strike out the pleas upon grounds which are set forth in the special record at pages 183–185, and the court granted the motion, "to which the defendants then and there excepted, and their exception was allowed." The motion was granted upon the ground that these pleas presented no defense; and this ruling was sustained on appeal by the Supreme Court of Mississippi upon that ground, as follows (transcript, p. 685).

> "The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action in whole or in part. The former opinion of this court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect nothing else than an effort to have the circuit court disregard that opinion."

It would seem that the defendant in error is representing that the only pleas which alleged "a compliance with the requirements of the charter" were those which

were withdrawn, but the contrary is the fact. The court will see by reference to the concluding paragraph of the fourth plea stricken out (transcript, p. 568; special record, pp. 168, 169) that compliance with the requirements of the statute was fully and distinctly alleged. There can be no doubt whatever upon this point. The pleas stricken out covered the whole case in all its aspects; and when they were stricken out as presenting no defense to the action in whole or in part, there was nothing left to try.

The trial court having decided that the plea of the charter agreement and its impairment in violation of the contract clause of the Federal Constitution presented no defense, the defendants, in accordance with the local practice, withdrew the remaining pleas and appealed upon a special bill of exceptions (special record, p. 186), which presented the question of law whether or not the special pleas so setting up the Federal question did or did not present a defense to the plaintiff's action. The judgment below clearly shows that the pleas involving the Federal question were not withdrawn, for it says (special record, p. 188) "*not including, however, the pleas which have been stricken out by the court*," and those pleas, to repeat, were stricken out because "they presented no defense to the action in whole or in part." It would, of course, have been futile to continue litigating in the face of a ruling by the court that as matter of law the defense was unavailing.

Even if the point as to the pleas being filed too late was made below in the trial court and in the state supreme court, it must have been decided against the defendant in error, for the court placed its decision squarely on the ground that the pleas stricken out presented no defense. If the point as to the effect of withdrawing some

of the pleas and allowing judgment *nil dicit* was also urged in both courts, it was overruled as untenable. In a word, if these points were decided, they were decided in our favor. But these possible grounds of decision are immaterial. "It is what was actually decided that we are to consider, not what might have been decided" (*Detroit Railway Co.* v. *Guthard*, 114 U. S. 133, 136).

To say that the judgment in this case is the equivalent of a default or a consent judgment is unwarranted. It is no more than if these defendants had demurred to a declaration which properly set forth all the facts and the court had overruled the demurrer, with leave to answer or go to trial upon the merits. The defendant, of course, would have a perfect right to allow the entry of judgment and to appeal upon the law.[1] That was what was done in this case; what the trial court understood was being done, and what the state supreme court in affirming the judgment below understood had been done when it ruled that the pleas "presented no defense to the action in whole or in part." Had the court not so ruled, the defendants would, of course, have gone to trial on the merits. It would tend to introduce most unfair practice, in cases in which a party has had his pleas stricken out on the ground that they presented no defense, if this court would approve a claim that the pleas

1. In *Ker* v. *Illinois*, 119 U. S. 436 (a criminal case), it appeared that the defendant during the trial presented a plea in abatement which was overruled, and "the defendant refusing to plead further, a plea of 'not guilty' was entered for him according to the statute of that state by order of the court, on which the trial and conviction took place." The plea in abatement set forth the alleged Federal right claimed to be involved. This question was held to be preserved by these proceedings, and the judgment of the Supreme Court of Illinois was considered and affirmed upon the merits. See also, *Argentine Co.* v. *Terrible Co.*, 122 U. S. 478, 479; *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196, 221; *Clyde Mallox* v. *United States*, 146 U. S. 140, 147; *Perego* v. *Dodge*, 163 U. S. 160, 164.

might have been stricken out upon some technical point of local practice, which the court below did not assign in depriving a party of his rights, but, on the contrary, held to be untenable. "It is enough to say that a trial in a court of justice is meant to be a fair struggle after the truth, and not a rivalry of shrewdness, or a trap for the unwary."[1]

3 AND 4.

THE THIRD AND FOURTH GROUNDS.

The third and fourth grounds assert that the petition to remove the case was too late.

The petition for removal is not relied upon as a ground of reversal in this court by the plaintiffs in error. The other errors are sufficient to present all questions. The practice of presenting the petition at that time seemed to be authorized by the case of *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92, 98. When the state supreme court reversed its prior decisions and for the first time held the contract invalid or to be no longer in existence, thus clearly overruling the doctrine of the prior cases, it seemed to counsel for the Railroad Companies that the case then, for the first time, might perhaps be held to have become in its nature removable, and that, if a petition for removal was presented immediately upon the filing of the mandate from the state supreme court, it would be in due time. This was done the day after the filing of the mandate. But, as the point is not relied on by the plaintiffs in error, it would be a waste of the time of this court to go more in detail into the theory upon which the petition for removal was filed.

1. *Salisbury* v. *Howe*, 87 N. Y. 128, 134.

5.

THE FIFTH GROUND.

The fifth ground of the motion is (p. 23):

> "That the alleged exemption is unconstitutional because in terms *irrepealable*."

There can surely be no doubt that the inquiry whether the contract relied on is repealable does present a Federal question.

In a subdivision of this point, however, the defendant attempts to state the position of the plaintiffs in error as follows (p. 24):

> "It is not claimed by the plaintiffs in error anywhere that their alleged exemption was ever repealed or attempted to be repealed by the Legislature. But they claim that the *decision of the Supreme Court* violates section 10, article I., and the 14th amendment of the Constitution of the United States."

This statement entirely misrepresents the point upon which the plaintiffs in error rely.

The taxes in question were assessed under the revenue act of 1892, printed in the appendix. The plaintiff could not possibly maintain his suit without relying upon this subsequent legislation and having effect given to it. The plaintiff below, as State Revenue Agent, sued, and the recovery herein has been awarded, under statutes passed long after these charters. Nothing can possibly be clearer than that the judgment below gave effect to subsequent legislation, which has impaired the obligation of the contract relied on (*Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184; *McCullough* v. *Virginia*, 172 U. S. 102). In the Yazoo case, as appears from the quotation at page 28 of this brief, this very point was expressly decided.

6 AND 7.

THE SIXTH AND SEVENTH GROUNDS.

These grounds are (pp. 25, 27):

> "That the alleged exemption was lost in and by the consolidation of October 24, 1892. * * That section 180 of the Constitution of November 1, 1890, prevented any exemption from passing into the consolidation of October 24, 1892."

These points necessarily involve the question whether there is a contract still in existence to be impaired. The defendant in error contends under this head that the effect of the consolidation on existing contract rights "is merely a construction by the state court of its own local laws, and raises no Federal question" (p. 25). This point, however, is discussed at length on pages 26–29 of this brief.

8.

THE EIGHTH GROUND.

This ground is (p. 29):

> "That the alleged exemption was repealed by the acts of 1884, 1886 and 1890."

No argument can be necessary to show that this involves a Federal question.

Yet in support of this point, it is solemnly urged that the plaintiffs in error are estopped from denying that their contract rights are repealable because it was held in the *Mississippi Mills* case, 56 Miss. 40 (now repudiated and overruled after twenty years of acquiescence) that the charter rights there discussed were repealable. In the case at bar, the contract right in the charter is expressly made irrepealable, viz.: "and which agreement is irrepealable." In the Mississippi Mills charter no such clause was contained. The court below, in referring to the *Mississippi Mills* case, which the defendant in

error now attempts to use as a basis for estoppel, said (transcript, pp. 514, 686):

> "The exemption claimed in *Miss. Mills* v. *Cook* HAD NO IRREPEALABLE feature. * * * Moreover, the twenty-first section of the Mobile and Northwestern charter was not passed on in *Mississippi Mills* v. *Cook*, and we held in our former opinion that its constitutionality was never squarely presented, as to the point for decision, until the former judgment in this case."

9.

THE NINTH GROUND.

This ground presents questions of local practice, such as the refusal to adjourn the case, which do not involve points that the plaintiffs in error will urge here.

10, 11 AND 12.

THE TENTH, ELEVENTH AND TWELFTH GROUNDS.

In these three grounds, the defendant in error urges this court to dismiss the writ of error because a citation has not issued to parties who were never before the court below and who are not parties to the judgment appealed from. *The summonses printed in the special record* (*p.* 26) *were not before the court below, and are not in the transcript of the record before this court.* In support of these grounds of dismissal, the case of *Wilson* v. *Kiesel*, 164 U. S. 251, 252, is cited. In that case, it was quite properly held that where a citation had not been issued to certain parties who were defendants in the court below and who were directly and vitally interested in the disposition of the cross-complaint and necessary parties to the appeal, the appeal could not be sustained.

It should hardly lie in the mouth of the defendant in error, as State Revenue Agent, to assert in this court that the proceedings instituted and conducted by him below

were defective for want of necessary parties; for, if the parties are necessary here, *a fortiori* they were necessary below.

The defendant in error may, however, be proceeding under a misapprehension. He fails to refer the court to the amended statute under which this suit was brought. This omission is probably an oversight; but the court will at once see that this omitted statute is most pertinent, and expressly authorizes the maintenance of this suit by the defendant in error as sole plaintiff. Thus section 2 of the Mississippi Act of February 7, 1894 (Laws of 1894, p. 29), provides:

> "The State Revenue Agent * * shall have power, and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies and associations of persons for all past due and unpaid taxes of any kind whatever, for all penalties or forfeitures for all past due obligations and indebtedness of any character whatever owing to the State or any county, municipality or levee board, and for damages growing out of the violation of any contract with the State or any county, municipality or levee board. *He shall have a right of action and may sue at law or in equity in all cases where the State or any county, municipality or levee board has the right of action or may sue.*"

The assessors and tax collectors were not parties to the original suits. The only persons named as parties in the declarations therein were Wirt Adams, State Revenue Agent, plaintiff, and the Yazoo and Mississippi Valley Railroad Company and the Illinois Central Railroad Company, defendants (special record, pp. 13, 24). It is true that the declarations conclude with a formal allegation that the assessors and collectors are made parties, and with a prayer that "they *and* said defendants be summoned," etc.; but, as appears by the special record (pp. 29, 31), none of these officials was ever actually summoned, ex-

cept that the summons upon the declaration for the taxes of 1897 seems to have been served upon the clerk of the Railroad Commission and to have been received by the Sheriff of Hinds County. *These facts, however, do not appear in the transcript of the record below, but are imported into the case by the special record.* None of these officials appeared or was represented upon the trial of the action. No evidence affecting them was adduced. No relief was asked against them. None of them joined in the appeal to the state supreme court or was made a party appellee therein. The final judgment of the circuit court entered July 8, 1898, is in form a common-law judgment in favor of Wirt Adams against the two Railroad Companies and no others (special record, p. 188); and the final judgment of the state supreme court is also in form a common-law judgment in his favor against the two Railroad Companies and the sureties upon the appeal bond and no others (*Id.* p. 197).

It will also be observed that the question affecting the assessors and tax collectors involves nothing which could be the subject of discussion or decision in this court (*Murdock* v. *City of Memphis*, 20 Wall. 590, 615). The only relief possible against an assessor or tax collector is upon a collateral point, namely: "If it shall appear that the failure of the taxpayer to properly pay his taxes was caused by any willful default or negligence of the assessor or tax collector, judgment shall be rendered against the defaulter or defaulters for the amount of compensation of the revenue agent" (special record, pp. 25, 26).

The court has, at this term, settled the question upon very similar facts in *Central Loan and Trust Co.* v. *Campbell*, 173 U. S. 84, 90, where Mr. Justice WHITE said:

> "On the threshold it is necessary to dispose of a suggestion of want of jurisdiction made by the appellee. It is based on the proposition that, as the intervenors in the trial court are not made parties to this appeal, we are without jurisdiction, since the judgment to be rendered may materially prejudice their rights. *But the intervenors did not except* to the action of the trial court in vacating the attachment and dismissing the action. *They were not made parties to the proceedings in error* prosecuted from the judgment of the trial court to the Supreme Court of the Territory. In that court the cause was determined without any suggestion, so far as the record discloses, that the questions arising in the record could not be decided in the absence of the intervenors, and the Supreme Court of the Territory manifestly assumed that the intervenors were not essential parties to a determination of the controversy before it, since it passed on the case as presented without their presence. *If their absence was treated by the parties to the proceedings in the Supreme Court of the Territory as not affecting the right to a review of the judgment of the trial court, there can be no reason why we should now hold that the presence of such intervenors is necessary on this appeal, which has solely for its object a review of the judgment rendered by the Supreme Court of the Territory.* Considering the facts just stated, and the further fact that it is obvious that the rights of the intervenors cannot be prejudiced by a review of the action of the Supreme Court of the Territory in dismissing the cause for want of jurisdiction, the motion to dismiss is overruled."

In *Payne et al.* v. *Niles et al.*, 20 How. 219, 221, Chief Justice TANEY said:

> "It is very well settled in all common-law courts that no one can bring up as plaintiff in a writ of error the judgment of an inferior court to a superior one unless he was made a party to the judgment in the court below; nor can any one be made a defendant in the writ of error who was not a party to the judgment in the inferior court."[1]

---

[1] See, also: *Cox and Dick* v. *United States*, 6 Pet. 172, 182; *Forgay et al.* v. *Conrad*, 6 How. 201, 203; *Brewster* v. *Wakefield*, 22 How. 118, 129; *Germain* v. *Mason*, 12 Wall. 259, 261; *Simpson* v. *Greeley*, 20 Wall. 152, 157; *Basket* v. *Haskell*, 107 U. S. 602, 608; *Hanrick* v. *Patrick*, 119 U. S. 156, 164; *Gilfillan* v. *McKee*, 159 U. S. 303, 312.

It is then urged (defendant's brief, p. 34), that, because the State Revenue Agent is "not liable for costs and may appeal without bond" under the Mississippi statute of 1892, this court cannot violate the state statute and award costs, and consequently should make other state officials parties simply to award costs against them. The act of 1894, under which these suits were brought, is silent as to liability for costs. But the court will view with some surprise the proposition that, because a state officer is not liable for costs in a state court, he cannot be made liable here, and that a local provision of practice as to liability for costs is to regulate and determine who are proper and necessary parties in this court.

This point is far-fetched and ought not to have been made even for the chance of creating "color" for the motion to dismiss. If all such parties were necessary to an appeal or writ of error, it would bring before this court on every appeal parties whose interest in the litigation was most remote. Such a rule of practice could hardly commend itself as wise or prudent. But, even if it were held that in this case such parties were technically necessary, the court would not hesitate to direct a citation to issue to bring them in, as was done in *Mendenhall* v. *Hall*, 134 U. S. 559, 567.

CONCLUSION.

For the foregoing reasons, it is submitted that the motion to dismiss should be denied and the case reserved for oral argument on the merits.

Washington, D. C., April 24, 1899.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
JAMES FENTRESS,
NOEL GALE,
Of counsel for plaintiffs in error.

APPENDIX A.—Laws creating the contract in question.
" *B.—Laws impairing the obligation of the contract.*
" *C.—Lists of railroad charters.*

APPENDIX A.

Laws creating the contract in question.

An Act to incorporate the Mobile and Northwestern Railroad Company, approved July 20, 1870.

LAWS OF 1870, Ch. 104, Sec. 21.

SECTION 21. *Be it further enacted*, that in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said Company (and which agreement is irrepealable), that all taxes to which said Company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said Company may have incurred in the construction of said road, or for money borrowed by said Company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said Company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said Company a receipt in full for the amount of said taxes upon receiving from said Company an affidavit made by the president or cashier of said Company that the amount of said taxes have actually and in good faith been paid and applied by said Company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, County, State, and Municipal, to which said Company shall be subject; *provided, however*, that whenever the profits of said Company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said Company to the tax collector, to be by him paid over as required by law. Laws Mississippi, 1870, p. 268.

ACT APPLYING SECTION 21 TO THE MEMPHIS AND VICKSBURG RAILROAD COMPANY AND OTHERS.

An Act supplemental to the Acts of incorporation of certain Railroad Companies, approved August 8, 1870.

LAWS OF 1870, CH. 113.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the provisions of the twenty-first section of an Act entitled, "An Act to incorporate the Mobile and Northwestern Railroad," be, and they are hereby made to apply to the following railroad companies: The Memphis and Vicksburg Railroad; the Vicksburg, Yazoo Valley, and Grenada Railroad; the Canton and Vicksburg Railroad; the Natchez and Jackson Railroad; the Meridian and Red River Railroad; the Ship Island, Mississippi City, and Paducah Railroad; the Elyton and Aberdeen Railroad; the Grenada, Louisville, and Meridian Railroad; the Greenville and Rolling Fork Railroad; and the charters of said companies are hereby amended so as to confer upon said companies all the rights, privileges, immunities, and franchises granted by the act of incorporation of the said Mobile and Northwestern, embraced in the twenty-first section thereof.

SEC. 2. *Be it further enacted*, That this Act take effect and be in force from and after its passage. Laws Mississippi, 1870, p. 327.

CHARTER OF THE MEMPHIS AND VICKSBURG RAILROAD COMPANY.

An Act to incorporate the Memphis and Vicksburg Railroad Company, approved August 8, 1870.

LAWS OF 1870, CH. 112.

(Authority to consolidate was conferred by this act upon the Memphis and Vicksburg Railroad Company.)

SEC. 16. *Be it further enacted*, That said company shall have the right and power to consolidate the stock, property, and franchises of the road with any other road or roads, in or out of this State, at any time that the President and Directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company. Laws Mississippi, 1870, p. 326.

5470

CHARTER OF THE NEW ORLEANS, BATON ROUGE, VICKSBURG AND MEMPHIS RAILROAD COMPANY.

An Act to incorporate the New Orleans, Baton Rouge, Vicksburg and Memphis Short Line Railroad Company, approved March 9, 1882.

LAWS OF 1882, CH. 547.

(Authority to consolidate was conferred by this act upon the "Baton Rouge" Company.)

SEC. 25. *Be it further enacted*, That the company shall have power and authority to purchase and hold any connecting railroad, and operate the same or to consolidate the company with any other company, under the name of one or both; but when such purchase is made or consolidation is effected the said company shall be entitled to all the benefits, rights, franchises, lands and property of every description belonging to said road or roads so sold or consolidated. Laws Mississippi, 1882, p. 932.

CHARTER OF THE LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY.

LAWS OF 1882, CH. 555.

(By this act the power to consolidate already conferred upon the Memphis and Vicksburg Railroad Company and the "Baton Rouge" Company was extended to the company to be formed; and the provisions of Section 21 were also made applicable to such Company.)

An Act to authorize the Memphis and Vicksburg Railroad Company, and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation, approved March 3, 1882.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company, be, and they are hereby authorized and empowered to consolidate with each other, or with each other and any other railroad company or companies, whether such company or companies have been incorporated under the laws of this State or of any other State, so that all of the companies so consolidating shall be merged into and become one company; and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this State, and shall have, enjoy and possess all the rights, ways, privileges, franchises, property, grants and immunities, which are

now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specially in this Act, and to that end the charters of said consolidating companies shall be taken and held to be a part of this Act. Laws Mississippi, 1882, p. 1011.

SEC. 5. *Be it further enacted*, That the provisions of the twenty-first section of an Act entitled, "An Act to incorporate the Mobile and Northwestern Railroad," approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be part of this Act, and this section shall be construed as though the said twenty-first section was specially and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this Act. *Id.*, p. 1013.

CHARTER OF YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY.

LAWS OF 1882, CH. 541.

An Act incorporating the Yazoo and Mississippi Valley Railroad Company, and declaring its powers, approved February 17, 1882.

SEC. 5. *Be it further enacted*, That said company may, from time to time, mortgage or convey in trust any or all of its property, real, personal or mixed, of any and every description whatsoever, then owned or thereafter to be acquired, and also all or any of its rights, powers, privileges, liabilities, immunities and franchises whether then owned, possessed and enjoyed or thereafter to be acquired, including its rights to be a corporation; and under such deed or deeds of trust or mortgage secure, execute and dispose of the mortgage bonds of said company, to such amounts and maturing at such times and bearing such interest as it may deem best; said company may also execute a mortgage or mortgages and trusts as aforesaid, to secure bonds or obligations of other railroad companies, or may endorse the bonds of any other railroad company or companies; or in any other manner guarantee such bonds, and secure the same by a mortgage or mortgages on its own property and franchises, then owned or thereafter to be acquired, as fully as it could do if the bonds were issued by it as aforesaid; said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidating companies may agree upon; and it may lease its railroads and all its property and franchises, rights, powers, privileges and immunities then owned or thereafter to be acquired,

or lease other railroads in or out of this State, for a term of years or in perpetuity, and upon any such consolidation the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company; and in case of a lease, the lease (lessee) shall, so far as the terms of the lease may allow, enjoy and possess all the property, rights, powers, privileges, liberties, immunities and franchises which the lessor had as to the leased premises; the said company is also authorized to do an express business over its own and other lines of railroad and steamboats or other conveyances in and out of this State; and to acquire or put up, use and operate a line or lines of telegraph in this and other State or States, and to acquire, hold and enjoy all such property as may be proper, necessary or convenient in doing the said express or telegraph business *provided*, that by such consolidation the maximum in section six applies only to roads hereafter built. Laws Mississippi, 1882, p. 842.

AMENDATORY ACT OF MARCH 15, 1884 (CH. 593).

(This act, supplemented by the consolidation agreement, operated to confer upon the Louisville, New Orleans and Texas Railway Company the power to consolidate already possessed by the Memphis and Vicksburg and the "Baton Rouge" Railroad Companies. The consolidation agreement expressly covered "*franchises, grants, * * * privileges,*" thus including the existing right to consolidate).

An Act to amend an Act entitled "An Act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3, 1882.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the act entitled "An act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3, 1882, be, and the same is hereby so amended as to authorize and empower the Memphis and Vicksburg Railroad Company and any other railroad company or companies incorporated under the laws of this State, to consolidate, in the manner and upon

the terms and conditions, and with the rights, privileges and immunities, in said act mentioned, with each other and any railroad company or companies incorporated or organized under the laws of any other State or States, and that such consolidation may be so effected whether the Mississippi Valley and Ship Island Railroad Company becomes a party to such consolidation or not.

SEC. 2. *Be it further enacted*, That this Act take effect and be in force from and after its passage. Laws Mississippi, 1884, p. 936.

ACT AUTHORIZING CONSOLIDATION BY NATCHEZ, JACKSON AND COLUMBUS RAILROAD COMPANY.

LAWS 1890, CH. 502.

An Act to authorize the Natchez, Jackson and Columbus Railroad Company to sell its railroad, situated in this State, or to consolidate the same, approved February 19, 1890.

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That the Natchez, Jackson and Columbus Railroad Company, incorporated on the 21st day of July, 1870, under the laws of this State, be and it is hereby authorized and empowered to sell absolutely all or any part of its railroad and other property, lying, being and situated in the State of Mississippi, together with all franchises, rights, powers, privileges and immunities, unto the said Natchez, Jackson and Columbus Railroad Company appertaining and belonging.

SEC. 2. That the Louisville, New Orleans and Texas Railway Company, and the Natchez, Jackson and Columbus Railroad Company are hereby authorized to consolidate with each other, under the name of the 'Louisville, New Orleans and Texas Railway Company,' and upon such terms as may be agreed upon by said companies.

SEC. 2. (3). That this Act take effect and be in force from and after its passage. Laws Mississippi, 1890, p. 675.

APPENDIX B.

Laws impairing the obligation of the contract.

CONSTITUTION OF THE STATE OF MISSISSIPPI, 1890.

SECTION 180. All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this constitution shall be subject to the provisions of this article; and all such charters under which organizations shall not take place in good faith and business be commenced within one year from the adoption of this constitution, shall thereafter have no validity; and every charter or grant of corporate franchise hereafter made shall have no validity, unless an organization shall take place thereunder and business be commenced within two years from the date of such charter or grant.

SECTION 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature. And domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required to be paid by foreign insurance companies doing business in this State, except to the extent of the excess of their ad valorem tax over the privilege tax imposed upon such foreign companies; and the legislature may impose privilege taxes on building and loan associations in lieu of all other taxes except on their real estate.

SECTION 279. All writs, actions, causes of action, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the State, and charters of incorporation shall continue; and all indictments which shall have been found, or which shall hereafter be found, and all prosecutions begun, or that may be begun, for any crime or offense committed before the adoption of this constitution may be proceeded with and upon as if no change had taken place.

ANNOTATED CODE OF MISSISSIPPI, 1892, p. 860—CHAPTER 116—REVENUE.

3875 (597). *Assessment and taxation of railroads; each company to file schedule.*—Each railroad company owning and operating

a railroad, shall, on or before the first Monday in April in each year, file with the railroad commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles or fractions thereof of its entire road-bed, switches, and side tracks, and showing how many miles or fractions thereof lie in this state, and in each county of the state, and each city, town, or village, and the value of the whole and each part thereof, as subdivided herein; the total amount of capital stock, its par value and its actual value, and the value of its franchise; the number of engines and their respective values; the gross amount of receipts in the year preceding; the number of cars of all kinds, their classes and value; the number of depot-buildings and warehouses and other buildings; in what county and city, town, village, or levee district located, and the value of each, including the lands and lots upon which the same are built; the value of all machine and car shops and stationary machinery and tools therein, and in what county and city, town, village, or levee district located, including the land upon which the same are built; all real, personal, or mixed property belonging to the company within the State, not enumerated, with its value; the number of bridges and ferries in this state, in what county and city, town, village, or levee district situated, and the value of each, and specifying whether such value is or is not included in the value of the road-bed; a list of all lands in this state owned, describing the same, and giving the location and value thereof, the quantity of land used for depots and machine-shops, and its value aside from the buildings thereon; the gross amount of receipts the year preceding from passengers and freights separately, and the proportion thereof earned within and from this state; and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made.

3876. *The same; penalty for failure.*—If any company, corporation, or person who should do so, shall fail, neglect, or refuse to render the schedule required by the last section, such company, corporation, or person shall forfeit and pay to the state, for every such failure, neglect, or refusal, the sum of five thousand dollars, to be recovered by action, which shall be instituted and prosecuted under the direction of the railroad commission; and, in case of such failure, neglect, or refusal, the commission shall make out such schedule from the best information obtainable.

3877. *The same; state railroad assessors.*—The members of the railroad commission are constituted state railroad assessors, and they shall, upon the receipt or making and completion of the sched-

ules provided for in the last two sections, assess all railroads, telegraph, sleeping-car, and express company property liable to taxation in the state, affixing its true value, so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, the capital stock engaged in the business in this state; and the railroad assessors may adopt other and further rules necessary and proper to ascertain the value of property to be assessed by them, including the amount of capital engaged in the business in this state.

3878. *The same; not bound by schedules rendered.*—If in any case the state railroad assessors have reason to believe that any railroad company, or person owning or operating a railroad, has rendered a false or fraudulent schedule, and that an assessment predicated thereon will relieve such company or person of a just share of taxation, they shall not, in making the assessment, be bound thereby, but they shall make out a proper schedule as if none had been rendered, first giving such person or company five days' notice to come forward at a time and place to be named, and show cause why such a course should not be pursued. Such notice shall be served and returned as a summons from a court.

3879. *The same; records to be kept and preserved.*—Complete and full records shall be kept by the railroad commission of all things done under the authority conferred upon it and on its members by the provisions of this chapter.

3880. *The same; assessments to be made by the counties, etc.*—The state railroad assessors shall, if practicable, on or before the first Monday of June, and if impracticable, as soon thereafter as it can be done, in each year, make out for each county having any railroad, telegraph, sleeping-car, palace-car, dining-car, or express company property therein an assessment-roll of such property, both real and personal, and the same shall be in such form as they may prescribe, as near in conformity to ordinary assessment-rolls as convenient and practicable, the property in cities, towns, villages, and levee districts being distinguished; and the same shall contain all the property of any such company or other railroad property in the county, and the value thereof, and the state taxes thereon, and so made that each county, levee district, and municipality shall receive its just share of such taxes proportionately to the amount of the property therein situated; and the same, when made, shall remain on deposit for one month in the office of the railroad commission, and be for said time subject to the objections thereto which may be filed; but the taxes on other real estate

belonging to railroads than that forming a part of the road, shall not be extended on the rolls.

3881. *The same; objections heard, etc.*—It shall be the duty of the railroad commissioners to meet in the capitol, at the city of Jackson, on the first Monday in July of each year, or, in case of failure, as soon thereafter as practicable, for the purpose of hearing and considering objections to assessments made by them; and they shall remain in session until all objections are heard and disposed of; and they may, if they think objections just, sustain the same and amend assessments, if necessary, accordingly.

3882. *The same; assessments sent to the counties.*—So soon as the assessment-rolls have remained subject to objection for one month, and when all objections, if any, are disposed of, the assessment-rolls shall be approved either by order of the railroad commission or by operation of law, and the same shall be sent to the clerks of the boards of supervisors of the respective counties, who shall file and preserve the same as a record.

3883. *The same; duty of the clerk.*—The clerk shall make two copies of said assessment-roll, as of other assessment-rolls, and dispose of them as provided by law in case of the general assessment-rolls, and perform all duties required of him in other cases. (See § 3794*a*.)

3884. *The same; the tax-collectors.*—The tax-collectors shall collect the railroad taxes from said rolls in all respects as he collects other taxes; but in case of a sale for delinquent railroad taxes, the collector shall first seize and sell personal property or lands other than the road-bed; and, second, rolling-stock; and, lastly, the road-bed of the railroad in his county.

3885. *Telegraph, express, sleeping-car companies, etc.*—Telegraph, express, sleeping-car, palace-car, and dining-car companies shall be assessed for ad valorem taxation in the same manner as railroads; and the railroad commissioners shall be assessors thereof, and shall perform the same duties in respect thereto as in the case of railroads, and at the same time and with like effect. The clerks and tax-collectors shall perform the like duties as required in case of railroads.

3886. *The same; schedules.*—The person or corporation owning or operating a telegraph line, or carrying on the business of an express, sleeping-car, palace-car, or dining-car company, shall file the schedules required of railroads within the time and under like penalties; and the schedules shall contain the same or such of the

particulars required of railroads as to the property and rights of the company, as the railroad commissioners shall direct, and such other particulars as they shall demand.

Laws of 1894, Ch. 34.

An Act to provide for the election of a State Revenue Agent, to prescribe his powers and duties, and to repeal sections 4187, 4190, 4191, 4192, 4193 and 4195, in chapter 126 of the annotated code of Mississippi, approved February 7, 1894. Laws Mississippi, 1894, p. 29.

Section 1. *Be it enacted by the Legislature of the State of Mississippi*, That there shall be a State Revenue Agent, who shall be elected at the general election in 1895 in the same manner that other State officers are elected, and whose term of office shall be four years, and until his successor is elected and qualified. The present incumbent shall hold office for the term of his appointment, and until his successor is elected and qualified.

Sec. 2. The State Revenue Agent may appoint a sufficient number of deputies. He shall have power and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies and associations of persons for all past due and unpaid taxes of any kind whatever, for all penalties or forfeitures for all past due obligations and indebtedness of any character whatever owing to the State or any county, municipality or levee board, and for damages growing out of the violation of any contract with the State or any county, municipality or levee board. He shall have a right of action and may sue at law or in equity in all cases where the State or any county, municipality or levee board has the right of action or may sue. It is the duty of the State Revenue Agent to investigate the books, accounts and vouchers of all fiscal officers of the State, and of every county, municipality and levee board, and to sue for, collect and pay over all money improperly withheld from either, and he has the power to sue and right of action against all such officers and their sureties to collect any such moneys; but if the delinquency appear by a correct open account on the books of the proper accounting officer, the right of the Revenue Agent to sue shall arise only after he has given thirty days notice to the delinquent officer to pay over the amounts and he fails to do so.

Sec. 3. After the expiration of the fiscal year in which taxes become due should the Revenue Agent discover that any person, corporation, property, business, occupation or calling has

escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector in writing, and the collector shall within ten days thereafter make the proper assessment by way of an additional assessment on the roll or tax list in his hands, and give ten days notice in writing to the person or corporation whose property is assessed, and all objections to such assessments shall be heard at the next meeting of the board of supervisors of counties, or board of mayor and aldermen of municipalities. The board of supervisors or mayor and aldermen shall also be notified in writing by the collector of said assessment and the State Revenue Agent may appear at said meeting, and an appeal to the circuit court may be taken from the order of the board approving or disapproving such assessment by either party. If the assessment be approved and no appeal be taken, and the taxes shall not be paid within thirty days thereafter, the property, if it be real estate, shall be ordered sold as provided by section 3850 of the annotated code of Mississippi, and if it be personalty, the tax collector shall proceed to collect by distress or otherwise. If the tax collector shall fail or refuse to make an assessment and report the same as herein required, he shall be liable on his bond for the amount of taxes properly collectible and ten per cent. damages thereon. If the assessment rolls be in the hands of the assessor at the time the Revenue Agent makes discovery of property which has escaped taxation, he shall give the required notice to the assessor, who shall make the proper assessment, and give the required notices to the owner of the property and to the board of supervisors or mayor and aldermen, under like penalties for failure as provided against the collector, and like proceedings shall be had. When any taxes shall be collected under assessments made as herein required, the Revenue Agent shall receive therefor, at the time of collection, the same compensation allowed him by law for other collections.

SEC. 4. If the property which the Revenue Agent discovers to have escaped taxation shall belong to any railroad or other corporation which, under the law, is required to be assessed by the State railroad assessors, the Revenue Agent shall give the notice required herein to said State railroad assessors, and they shall give the required notice to the company or corporation. At their next meeting after giving the proper notice, said property shall be assessed in the same manner required by law, and placed on the proper county, municipal or levee board roll, and collected by the proper officers in the manner required by law, and the Revenue Agent shall have his compensation as in other cases.

SEC. 5. The Revenue Agent in the discharge of his official duties shall have full power and authority to examine and investi-

gate the books, records, papers, accounts and vouchers of any State, county, municipal or other officer.

SEC. 6. The Revenue Agent shall have power to sue for, collect and have assessed as herein required, delinquent taxes or taxes that have escaped the assessor and collector back to and including the year 1886, and no further.

SEC. 7. That sections 4187, 4190, 4191, 4192, 4193, and 4195, in chapter 126 of the annotated code of Mississippi, be and the same are hereby repealed.

SEC. 8. That this act take effect and be in force from and after its passage.

APPENDIX C.

List of railroad charters containing agreement for appropriation of taxes as embodied in section 21 of Act of July 20, 1870.

1870. Mobile and Northwestern Railroad Company, Laws 1870, pp. 255, 268.
" Memphis and Vicksburg Railroad Company, Laws 1870, p. 327.
" Vicksburg, Yazoo Valley and Grenada Railroad Company, *Ib.*
" Canton and Vicksburg Railroad Company, *Ib.*
" Natchez and Jackson Railroad Company, *Ib.*
" Meridian and Red River Railroad Company, *Ib.*
" Ship Island, Mississippi City and Paducah Railroad Company, *Ib.*
" Elyton and Aberdeen Railroad Company, *Ib.*
" Grenada, Louisville and Meridian Railroad Company, *Ib.*
" Greenville and Rolling Fork Railroad Company, *Ib.*
1871. Meridian, Red River and Texas Railroad Company, Laws 1871, pp. 119, 129.
" Artesia, Starkville and Grenada Railroad Company, Laws 1871, pp. 138, 147.
" Columbus, Fayette and Decatur Railroad Company, Laws 1871, pp. 187, 188.
" Lexington Branch Railroad Company, Laws 1871, pp. 189, 199.
" Elyton, Corinth and Tennessee River Railroad Company, Laws 1871, pp. 202, 218.
" Yazoo City, Raymond and Crystal Springs Railroad Company, Laws 1871, pp. 228, 236.
" Vicksburg, Pensacola and Ship Island Railroad Company, Laws 1871, pp. 237, 250.
" Ripley Railroad Company, Laws 1871, pp. 268, 279.
1872. Arkansas City and Grenada Railroad Company, Laws 1872, pp. 347, 360.
" Corinth, Kossuth and Kosciusko Railroad Company, Laws 1872, pp. 335, 346.
" Corinth and Nashville Railroad Company, Laws 1872, p. 283.
" Gibson and Rolling Fork Railroad Company, Laws 1872, pp. 294, 297.
" Grenada, Houston and Eastern Railroad Company, Laws 1872, pp. 286, 291.

5476

1872. Helena, Water Valley and Eastern Railroad Company, Laws 1872, pp. 299, 311.
" Mississippi River and Sardis Railroad Company, Laws 1872, pp. 380, 386.
" Natchez and Brookhaven Railroad Company, Laws 1872, pp. 362, 367.
" New Orleans, Baton Rouge and Vicksburg Railroad Company, Laws 1872, pp. 246, 255.
" New Orleans and Northeastern Railroad Company, Laws 1872, p. 314.
1873. Ashland Railroad Company, Laws 1873, pp. 518, 520.
" Ashland, Holly Springs and Chulahoma Railroad Company, Laws 1873, pp. 596, 597.
" Grenada, Louisville and Meridian Railroad Company, Laws 1873, pp. 513, 514.
" Holmes County Central Railroad Company, Laws 1873, pp. 520, 530.
" Liberty and Woodville Railroad Company, Laws 1873, pp. 499, 509.
" Mississippi City and Helena Railroad Company, Laws 1873, pp. 531, 540.
" Mobile and Little Rock Railroad Company, Laws 1873, pp. 576, 579.
" West and East Railway Company, Laws 1873, pp. 479, 488.
" Yazoo Valley Railroad Company, Laws 1873, pp. 543, 553.
1878. Natchez, Jackson and Columbus Railroad Company, Laws 1878, pp. 233, 234.
1880. Jackson, Yazoo City and Arkansas City Railroad Company, Laws 1880, pp. 228, 234.
" Greenville, Columbus and Birmingham Railroad Company, Laws 1880, pp. 246, 247.
1882. Vicksburg and Mississippi Railroad Company, Laws 1882, pp. 896, 916.
" Louisville, New Orleans and Texas Railway Company, Laws 1882, pp. 1011, 1013.

LIST OF RAILROAD CHARTERS GRANTING EXEMPTIONS FROM TAXATION.

1878. Port Gibson, Utica and Crystal Springs Railroad Company, Laws 1878, pp. 463, 472.
" Street railroads in Brandon, Laws 1878, pp. 484, 487.
1880. All railroads while in process of construction, Laws 1880, pp. 19, 86.

1882. Memphis and New Orleans Railroad and Levee Company, Laws 1882, pp. 874, 883.

" Yazoo and Mississippi Valley Railroad Company, Laws 1882, pp. 838, 847.

" Canton, Aberdeen, Fulton and Nashville Railroad Company, Laws 1882, pp. 1001, 1009.

" Memphis, Selma and Brunswick Railroad Company, Laws 1882, p. 1022.

" Gulf and Ship Island Railroad Company, Laws 1882, pp. 849, 861.

" Birmingham and Northwestern Railroad Company, Laws 1882, pp. 1040, 1049.

" Tennessee and Mississippi Rivers Railroad Company, Laws 1882, pp. 989, 1000.

" Vicksburg, Canton and Yazoo City Railroad Company, Laws 1882, pp. 1015, 1018.

" Meridian, Brookhaven and Natchez Railroad Company, Laws 1882, pp. 1049, 1064.

" Helena, Sardis, Pontotoc and Birmingham Railroad Company, Laws 1882, pp. 885, 895.

" Mississippi Mexican Gulf Railroad Company, Laws 1882, pp. 961, 974.

" Alabama and Mississippi Railroad Company, Laws 1882, pp. 863, 870.

" Mississippi and Arkansaw Railroad Company, Laws 1882, pp. 933, 942.

" Meridian, Winona and Helena Railroad Company, Laws 1882, pp. 943, 959.

" Mississippi, Alabama and Georgia Railway Company, Laws 1882, pp. 975, 988.

1884. Caledonia Branch Railroad Company, Laws 1884, pp. 888, 895.

" Warrior Coal Fields Railroad Company, Laws 1884, pp. 895, 901.

" Tombigbee Railroad Company, Laws 1884, pp. 901, 907.

" Moss Point, Scranton and East Pascagoula Railroad Company, Laws 1884, pp. 911, 915.

" Macon and Tuscaloosa Railroad Company, Laws 1884, pp. 915, 916.

" Mississippi River and Deer Creek Railroad Company, Laws 1884, p. 918.

" Memphis, Oxford & Columbus Railway Company, Laws 1884, pp. 919, 920.

5477

1884. Port Gibson and Alabama Railroad Company, Laws 1884, pp. 922, 934.
" Terry, Brandon and Northeastern Railroad Company, Laws 1884, pp. 936, 937.
" Helena, Memphis and New Orleans Railroad Company, Laws 1884, pp. 937, 938.
" Tombigbee and Grand Trunk Railroad Company, Laws 1884, p. 950.
" Natchez and Mobile Railroad Company, Laws 1884, pp. 951, 953.
" Front Street and Asylum Street Railway Company, Laws 1884, pp. 955, 956.
" Mississippi River and Mexican Gulf Railroad Company, Laws 1884, pp. 957, 963.
" Rodney, Jackson and Tuscaloosa Railroad Company, Laws 1884, pp. 968, 969.
" Mississippi River and Eastern Railroad Company, Laws 1884, pp. 975, 986.
" Tallahatchie Valley Railroad Company, Laws 1884, pp. 987, 992.
" New Orleans and Northwestern Railway Company, Laws 1884, pp. 994, 1004.
" Meridian and Brunswick Railroad Company, Laws 1884, pp. 1005, 1013.
" Helena, Water Valley, Aberdeen and Birmingham Railroad Company, Laws 1884, pp. 1014, 1023.